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Supreme Court, U.S.
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No. 00-1700

IN THE

Supreme Court of the United States

U-HAUL INTERNATIONAL, INC., ET AL.,

Petitioners,

v.

KAREN ROMANO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 22, 2001

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MISCELLANEOUS

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Petitioners, U-Haul International, Inc. ("UHI") and U-Haul Co. of Maine, Inc. ("U-Haul Maine"), reply to Respondent's Opposition to the Petition for a Writ of Certiorari.

I. Rule 51 Waiver Is Not An Issue In This Case.

Romano's entire waiver argument is premised on the erroneous notion that Petitioners' purported lack of specificity in objecting to the integrated enterprise jury instruction constituted a waiver of their rights to seek review of the precise legal issue raised on summary judgment, motions for directed verdict, and post-trial motions for judgment as a matter of law ("JMOL") and for a new trial. *See* Opposition at 5-10. Romano's arguments are legally incorrect.

A. Rule 51 Waiver Does Not Bar Review Of A Denial Of A JMOL Motion.

"The grant of judgment as a matter of law is not an instruction within the meaning of Rule 51." Wright & Miller, Federal Rules Practice §2536. Rule 51 standards simply are not applicable in determining whether Petitioners preserved their rights to appeal the denial of their JMOL motion:

> In the case before us, the focus of petitioner's challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict. Although the same legal issue was raised both by those motions and by the jury instruction, "the failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict." [Citation omitted.] Petitioner's legal position in the

> District Court . . . was consistent with the legal standard that it now advocates. It should not be surprising if petitioner's arguments in the District Court were much less detailed than the arguments it now makes in response to the decision of the Court of Appeals. That, however, does not imply that petitioner failed to preserve the issue raised in its petition for certiorari.

City of St. Louis v. Praprotnick, 485 U.S. 112, 120 (1988). *See also Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-514 (1988).

B. Rule 51 Waiver Does Not Bar Review Of A Denial Of A Motion For Summary Judgment.

A legal issue raised in a summary judgment motion that is denied is preserved for appeal without being reasserted as an objection to a jury instruction:

> Plaintiff's arguments miss the point, because defendant did object to the denial of an earlier motion for summary judgment . . . defendant did not, after its denial, lose its rights by defending itself on the merits . . . . When rights have been duly saved, they are not lost, or waived, by subsequent proceedings which would not have taken place had the movant's position prevailed."

Scola v. Boat Frances R., Inc., 546 F.2d 459, 460 (1st Cir. 1976).

Denial of Petitioners' motion for summary judgment preserved their appellate rights, even if they had not moved for directed verdict or JMOL on that particular issue, which they did. *See Bottineau Farmers v. Elevator Woodward-Clyde Consultants*, 963

F.2d 1064, 1073 (8th Cir. 1992); *Grubb v. FDIC*, 868 F.2d 1151, 1160 (10th Cir. 1989); *Scola, supra; Streamfeeder v. Sure-Feed Sys., Inc.*, 175 F.3d 974, 984 n. 2 (Fed. Cir. 1999).

II. The Trial Court Squarely Considered And Decided The Legal Issue That The Integrated Enterprise Test And Not Common Law Agency Principles Would Govern This Case.

A. Petitioners Pressed The Issue Below.

UHI was brought into this action kicking and screaming that it was not and has never been Romano's "employer" under Title VII. UHI raised this argument so many times and in so many ways that Romano's counsel was moved to complain after trial:

> [T]his is déjà vu all over again. We've had this argument with respect to the integrated enterprise situation both at summary judgment, we had it at trial, we have a jury verdict that concluded the actions of U-Haul Company of Maine were attributable to U-Haul International, and we're now revisiting the issue yet again.

Post-Trial Hearing Tr. at 15.

At the outset, UHI expressly denied it was Romano's employer and pleaded as a defense that it was not her employer. Answer ¶ 51; 19th and 20th Defenses. UHI then moved for summary judgment on the basis that it "is not the plaintiff's 'employer' as such term is used under Title VII." Motion for Sum. J. at p. 1, ¶ 1. *See also* Defendant's Memo. of Law in Support of Motion for Sum. J., at p. 4. ("U-Haul International, Inc. Was Not Karen Romano's Employer.").

UHI specifically focused on the lack of any agency relationship between it and its subsidiary, *id.* at pp. 4-5, cited the cases on which its agency arguments were based on appeal, *id.* at p. 6, n. 1, and argued that under common law agency principles:

> There was no employment relationship between Romano and UHI. UHI cannot therefore be held liable under Title VII as Romano's employer.

Id. at 6. *See also id.* at 16.

The trial court denied UHI's motion for summary judgment, ruling it would apply the four-factor integrated enterprise test rather than common law agency principles. In its pre-trial motions, UHI continued to object to the application of the integrated enterprise test:

> UHI contends it was not Karen Romano's employer at the time of her termination and that it cannot be found liable under Title VII . . . . This issue has recently been made the subject of a summary judgment motion . . . .

See Defendant's Pre-Trial Memo. at p. 1, ¶ 1. *See also id.* at p. 3, ¶ 2. UHI again pressed the issue in its proposed jury instructions.[1/]

[1/] *See* Defendants' Proposed Instruction No. 7 ("plaintiff cannot establish....that U-Haul International, Inc. was her 'employer'"); No. 5 ("The defendant U-Haul International, Inc. specifically denies it is liable to the

(footnote continued to next page)

At the commencement of trial the District Court ruled on the various *in limine* motions and expressly ruled that it would apply the four-factor integrated enterprise test rather than a common law employment/agency standard:

> THE COURT: Yeah, the other large issue that remains is the status of the defendants. In other words, whether U-Haul International is a viable defendant here or whether they're not....I'm pretty well satisfied that I'm going to instruct consistent with *Mas Marques versus Digital Equipment*, the four factors that they talk about in that case, plus the issue of control.

Tr. at 31. The District Court was clear that an agency argument would not be entertained.

At the close of plaintiff's case, Petitioners moved for JMOL, *see* Tr. at 296, raising "the discrete issue of whether U-Haul International, Inc. should remain a defendant in this case." Tr. at 301. At the charge conference, counsel objected that "the instruction as it stands is not a correct statement of the law," Tr. at 516; *see also* Tr. at 522, to which the District Court responded, "I indicated to you preliminarily that I was

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(footnote continued from previous page)

plaintiff because it was not the plaintiff's employer."); No. 8 ("You may not find that an employee relationship existed between U-Haul International, Inc. and the plaintiff....").

going to use that case [*Mas Marques*] as a standard." Tr. at 517. The District Court then assured the parties that their objections could be renewed "in a much more summary matter" after the jury was instructed, Tr. at 526, at which time Petitioners renewed and incorporated by reference all the objections and arguments previously articulated, *see* Tr. at 592, again specifically objecting to the integrated enterprise instruction, *see* Tr. at 592-93, and renewed their JMOL motion based on the earlier arguments. Tr. at 527.

In their post-trial JMOL motion, Petitioners expressly raised the issue that UHI and U-Haul of Maine "were separate corporate entities" and that under the doctrine of limited liability the presumption is the parent is not the employer of its subsidiary's employees. Defendants' Memo. of Law in Support of Post-Trial Motions at pp. 4-5. Petitioners urged as a matter of law that the integrated enterprise question should not have been put to the jury at all, *id.* at 6, and that "judgment should enter as a matter of law that UHI was not the plaintiff's employer." *Id.* at 7.

B. The District Court Passed on The Issue.

Where the District Court squarely decided the substantive issue presented and ruled that the integrated enterprise test rather than common law agency principles would be applied in determining if UHI were Romano's employer, it passed on precisely the first issue raised by this Petition. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256-57 (1981); *United States v. Williams*, 504 U.S. 36, 41-45 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991).

In fact, the District Court below **thrice** ruled on UHI's agency argument and thrice rejected it: first, by

denying the summary judgment motion, second, by submitting the integrated enterprise question to the jury, and third, by incorporating the earlier denials in its final judgment:

> In their Motion for Judgment as a Matter of Law, *Defendants restate legal and factual arguments made in their Motion for Summary Judgment and at trial.* The Court rejects these arguments for the reasons previously stated on the record.

Oct. 28, 1999 Order and Memo. of Decision. (Emphasis added).

Moreover, this Court has stated that:

> Our traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."

Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995), *quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992). Petitioners are not advancing new claims; they are merely elaborating arguments supporting their consistent claim under federal law that UHI cannot be held liable as a matter of law as Romano's employer. *See id.* at 378-79.

Finally, where both the District Court and the First Circuit explicitly passed on the *Kolstad* punitive damages issue, there can be no waiver on that point.

III. There Are Numerous Additional Reasons Why Waiver Does Not Apply.

1. The issue of whether a parent corporation can be considered the Title VII "employer"

of its subsidiary's employees is a question of subject matter jurisdiction, which is not waivable. *See* Petition for Certiorari at 25.[2/]

2. The specific "agency" argument was fairly embraced within the more general questions of the appropriate legal standard to apply to determine employment relationships in the parent/subsidiary context, the argument that UHI was not Romano's employer, and the arguments that the integrated enterprise test should not be applied at all.

3. Romano herself waived any right to assert waiver because she did not object to Petitioners' JMOL motion on the grounds of waiver but addressed it on the merits. *See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 284 (5th Cir. 1999); *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997); *Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995); *Moretto v. G&W Elec. Co.*, 20 F.3d 1214, 1220 (2d Cir. 1994).

4. Petitioners' challenge to the jury instruction was two-fold: first, the integrated enterprise issue should not have been submitted to the jury at all and, second, once it was, the formulation used by the District Court was erroneous. Rule 51

[2/] *See also U.S. Cath. Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988) ("The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics.").

lack of specificity waiver applies only to the second type of objection, and a failure to object to the jury charge on the first basis is not necessary where the movant has brought its legal position to the attention of the court. *E.g., Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 432 (5th Cir. 1996); *Dawson v. New York Life Ins. Co.*, 135 F.3d 1158, 1165 (7th Cir. 1998); *Stewart v. Ford Motor Co.*, 553 F.2d 130, 140 (D.C. Cir. 1977).[3/]

5. Rule 50(b) is essentially a notice provision: were the appellant's objections stated with sufficient clarity to apprise the trial court of the movant's legal position. *See* Wright & Miller, Federal Practice and Procedure § 2533 at 580. As the discussion above illustrates, the one issue that has driven this case from the trial level to the Supreme Court is what legal standard should be used to determine when, if ever, a parent corporation can be considered the Title VII employer of its subsidiary's employees. Romano can scarce claim surprise that the agency argument was first sprung on her at appeal. Romano herself alleges in the Complaint that "UHCM acts as UHI's agent," *see* First Amended Complaint ¶ 8, and that "UHI is an employer within the meaning of Title VII . . . because (a) UHCM is UHI's agent . . . and/or (d) alter ego." *Id.* at ¶ 34.

[3/] Moreover, where the "trial court consistently ruled adversely to petitioners on this point," and assured counsel their subsequent objections could be made in summary fashion, there is no waiver. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 27 (1962).

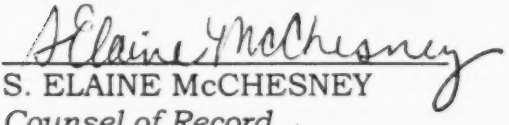
CONCLUSION

The integrated enterprise issue was pressed and passed on by the trial court, and there is no basis for this Court to deny certiorari on the basis of waiver. For the reasons previously stated, the petition for a writ of certiorari to the First Circuit should be granted.

Respectfully submitted,

U-HAUL INTERNATIONAL, INC. AND U-HAUL CO. OF MAINE, INC.,

By their attorneys,



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